

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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No. 13,011

BRIEF FOR APPELLANT WITH JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term 1955

CHARLES E. O'CONNOR, APPELLANT

v.

ARTHUR E. SUMMERFIELD, Postmaster General,
Post Office Department et al, Appellee

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

For the

District of Columbia Circuit

FILED

NOV 20 1956

Joseph W. Stewart
JOSEPHUS C. TRIMBLE
PRENTICE E. EDMINGTON
Attorneys for Appellant.

No. 13011

QUESTION PRESENTED

Was the institution of plaintiff's civil action in the court below within 12 months and 3 days following the accrual of his action, under the circumstances as here appear, such an unreasonable delay as to constitute laches.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,011. October Term 1955

CHARLES E. O'CONNOR, APPELLANT

v.

ARTHUR E. SUMMERFIELD, Postmaster General,
Post Office Department et al, *Appellee*

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT WITH JOINT APPENDIX

Statement of Case

Alleging that hearings resulting in his separation from his Civil Service position in the Boston Post Office were unfair, arbitrary and capricious and his constitutional rights violated, appellant brought this action in the District in which he prayed that defendant, Postmaster General, be ordered to restore him to his position from which he was illegally and wrongfully removed. By reason of the attack and their decision the individual members of the Civil Service Commission were made party defendants.

District Court

JURISDICTION

Jurisdiction in the District Court was based upon Sec. 14 of the Veteran's Preference Act (58 Stat. 390, 5 U.S.C. 861); the Declaratory Judgment Act (28 U.S.C. 2201) and Section 10 of the Administrative Procedure Act (5 U.S.C.

1009). The lower court's jurisdiction was not questioned by defendant.

Court of Appeals

JURISDICTION

This court has jurisdiction of this appeal pursuant to 28 U.S.C., Sec. 1291.

Disposition of Case Below

On a plea of laches filed by defendant, the judge below dismissed the plaintiff's suit. No other issue before the trial judge was reached.

Issues on Appeal

The sole issue presented by this appeal is the correctness of the trial judge's judgment sustaining the plea of laches.

The Facts

Appellant is a citizen of the United States and a War Veteran. While in the military service he secured an appointment on May 1, 1943 as a clerk in the Boston Post Office. December 16, 1945, following his honorable discharge, he entered upon the duties of his civil position as a substitute clerk. Having served the required probationary period, appellant became a permanent clerk on April 1, 1948 and entitled to all of the rights of a classified civil service employee of the United States accorded the veteran preferences of the Veteran's Preference Act, supra.

Following the filing of charges against appellant on Nov. 13, 1951, he was accorded a hearing before the U. S. Civil Service Regional office on May 6, 1952 and ordered separated from his civil service position. He appealed to the Civil Service Commission at Washington. December 14, 1952. The Civil Service Commission affirmed the dismissal order of its regional office.

Jan. 7, 1953 Congressman John M. McCormack wrote a letter to the Civil Service Commission on behalf of ap-

pellant, one of his constituents. As a result of the Congressman's intercession, the Civil Service Commission reopened and reconsidered appellant's case. Aug. 13, 1953 the Commission wrote Congressman McCormack that it adhered to its first disposition of the case, and held that plaintiff's dismissal was proper. This final action by the Commission on Aug. 13, 1953 exhausted appellant's administrative remedies. His only recourse was the institution of a civil action accorded to him by Sec. 10 of the Act approved June 11, 1946, commonly known as the Administrative Procedures Act, (5 U.S.C. 1009).

Appellant filed his civil action in the District Court against the Postmaster General and the members of the Civil Service Commission on August 16, 1954, that is to say one year and three days after the final action of the Commission.

That appellant did not act sooner in filing his suit below was attributable to the fact that the attorney of his choice, Mr. William F. A. Graham, during the period beginning in April 1952 and up until May 1954 was seriously ill and underwent a number of serious surgical operations which required long periods of convalescence. While Mr. Graham's brother was familiar with appellant's case, plaintiff naturally preferred that the attorney of choice, employed to represent him, take the proper action on his behalf in seeking judicial relief from his order of dismissal.

There is no evidence of record to show that appellant's position was filled or that the salary otherwise due him was paid to another.

Question Presented

Was the institution of his civil action in the court below within twelve months and three days following the accrual of his action, under the circumstances which here appear, such an unreasonable delay as to constitute laches?

ARGUMENT

The Administrative Procedure Act, *supra*, does not prescribe a period of limitations. No other Federal Statute can be found which imposes a statutory time limit on actions such as was brought by appellant in the court below. No Statute requires that such action be brought within a reasonable time. The defense of laches has grown out of those decided cases where an unconscionable, unexplained, long time has elapsed between the date when the action accrued and the date on which suit was filed. Since the theory of laches is equitable in nature it is appropriate in a given case to consider all the circumstances which lead to the delay.

This Court in *Nelson v. Worthington*, 3 App. D. C. 503 has held that laches depends on particular circumstances. In *Schickler v. Washington Brewery Co.*, 33 App. C.C. 35, it was held that equity may refuse to grant relief when it is sought after an unreasonable and *unexplained delay*. In *Haliday v. Haliday*, 56 App. D.C. 179, 11 F. (2nd) 565, it was held that in the District of Columbia, on question of laches the particular circumstances in each case are to be considered.

In the cases decided by this court in which the defense of laches was sustained, there appear no extenuating circumstances. For instance, in the *Vernon G. Haas* case, 222 F (2nd) 314, suit was filed slightly more than two years after his cause of action accrued. Haas had not exhausted his administrative remedies. There were no explanations of the delay or other extenuating circumstances, such as are present in the case at bar.

In the *Caswell* case, 98 F. (2nd) 296, the Court held that Caswell had not taken prompt action to assert his rights inasmuch as his suit was filed more than eighteen months after his cause of action, if he had one,—arose. There were no extenuating circumstances.

While it is true that because of laches the Court of Claims has dismissed suits by Government employees for back salary in cases where they alleged that their dismissal was in violation of statutory enactments, the rationale of these cases upholding the defense of laches is that where another has been appointed to and filled the position of the removed employee of the U.S., suits for salary should be brought promptly, otherwise the Government would be placed at a disadvantage in having to pay two persons for the performance of the same work. See *Arant v. U. S.*, 55 C. Cls. 329, 339.

In *Arant v. Lane*, 249 U. S. 367, another had been appointed, was serving and receiving the pay. In the case of *Plunkett v. U. S.*, 58 C. Cls. 359, at p. 370, the Court of Claims commenting on a delay of three years in asserting of claim by suit, said:

*** During all of this time, another *** was drawing the pay and allowances which he now claims should have been paid to him.

There is no evidence of record here that following his separation, appellant's position was filled by another and the salary otherwise due him was paid to his replacement.

The mere delay of twelve months and three days should not alone be the deciding factor here, for in the case of *Meyers v. U. S.*, 272 U. S. 52, 107, an appeal from a judgment of the Court of Claims dismissing Meyer's suit for salary because of delay of one year, two months and five days in bringing his suit, the Supreme Court held that such delay was not fatal to his right of action.

On the question of the effect of incapacity of any attorney by illness in determining a defense of laches the Court's attention is invited to the case of *Kaplan v. Joseph*, 125 F. (2nd) 602, 607, wherein delay in taking action was attributable to the illness of plaintiff's attorney. Plaintiff was promised by personnel in the attorney's office that

pending his attorney's recovery his rights were being preserved. Two years after he should have acted he employed another attorney and promptly filed the required action. The Court held that the delay was excusable and did not constitute laches.

Appellant here was a post office clerk totally ignorant of legal procedures. He, as most laymen, was familiar with the universal custom of the courts to defer action in cases which illness or other serious incapacity of counsel prevented their attendance at court or attention to business entrusted to them. That Appellant's attorney was seriously ill and totally incapacitated prior to and during practically the entire time of the delay cannot be questioned. The Court below so found. But it was error to hold that another lawyer not engaged by appellant could have acted for and in the stead of the retained incapacitated lawyer.

Allegation of Extenuating Circumstances of Delay

In paragraph 16 of the complaint, it was alleged that

"The plaintiff's attorney, William F. A. Graham, became seriously ill shortly after the hearings (before the Regional Board) in Boston, which illness necessitated his being in the hospital from April of 1952 to December of 1952, during which time he had a serious operation in which his spleen, stomach, part of his esophagus and rib were removed. Mr. Graham was unable to carry on his duties as an attorney until about May 1954 at which time he discovered this matter and referred it to Washington for further action. It is through this serious illness of Mr. Graham's over this two year period of time which has caused the delay in bringing this matter before the Court. All of Mr. Graham's legal work was suspended by agreement with various courts and counsel for opposing parties during this period of time."

The Court in its finding 8 found as a fact that

"During the period April 1952 to May 1, 1954, Mr. William F. A. Graham (appellant's attorney) was seriously ill and underwent a number of serious sur-

gical operations which required long periods of convalescence".

Under Rule 29 of the District Court, the complaint and answer of the defendant was referred to the Court's Commissioner of Veterans Cases. In his report to the Court its Commissioner recommended:

- (1) Plaintiff has shown in the pleadings and record a provable claim for grantable relief;
- (2) The defense of laches has been satisfactorily overcome by plaintiff's undisputed allegations;
- (3) There was a reopening of the proceedings in the Civil Service Commission in response to the request of Congressman McCormack; and that
- (4) There is no reasonable basis in law for the recommended affirmance of the initial agency action by the Appeals Examiner as evidenced by the transcript of evidence taken at the hearing.

Appellant recognizes that on questions of fact the report and conclusions of the Court's Commissioner are advisory and that the Court after hearing has the right to disregard the Commissioner's report. But, the lower Judge failed to give consideration to the extenuating circumstances causing the excusable delay in filing of the suit with more promptness.

CONCLUSION

It is respectfully submitted that appellant has shown excusable and extenuating circumstances which clearly takes his case out of the class of cases where the defense of laches were appropriately applied.

The judgment below should be reverse.

Respectfully submitted,

JOSEPHUS C. TRIMBLE

PRENTICE E. EDRINGTON

Attorneys for Appellant.

APPENDIX

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United States Court of Appeals

For the District of Columbia Circuit

No. 13,011 October Term, 1955

CHARLES E. O'CONNOR,

Appellant,

v.

ARTHUR E. SUMMERFIELD, Postmaster General,
Post Office Department, et al.,

Appellees.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 Filed Aug 16 1954 Harry M. Hull Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES E. O'CONNOR,

54 Gilbert Street,
Watertown, Mass.

Plaintiff

v.

Hon. Arthur E. Summerfield,

Postmaster General, Post Office Department,
Washington, D. C.

and

Hons. Philip Young,
F. J. Lawton, and

G. M. Moore, members of the Civil Service
Commission, Civil Service Commission,
Washington, D. C.

Defendants

Civil Action No. 3459—'54

Complaint for Declaratory Judgment and Injunction

Plaintiff alleges:

1. This Court has jurisdiction of this action. Such jurisdiction is founded upon Section 14 of the Veterans' Preference Act (58 Stat. 390, 5 U. S. C. 861), the Declaratory Judgment Act (28 U. S. C. 2201), and Section 10 of the Administrative Procedure Act (5 U. S. C. 1009).

2. That plaintiff is a citizen of the United States and a resident of the State of Massachusetts, and was appointed a Clerk in the Boston Post Office on May 1, 1943 while he was in the service of the United States Army

Signal Corps. Plaintiff reported for work on December 16, 1945. He was first appointed a substitute clerk, and was made a permanent clerk on April 1, 1948.

2 3. That plaintiff is a veteran, having served in the United States Army Signal Corps from March 27, 1942, until November 18, 1945, when he was honorably discharged from said service, and as such veteran plaintiff is entitled to preference.

4. That the defendant Arthur E. Summerfield is the duly appointed, acting, and qualified Postmaster General, and as such officer is charged with the administration of all laws relating to the employment and retention of employees under the jurisdiction of the Post Office Department, and is sued in that capacity only.

5. That the said defendants Philip Young, F. J. Lawton, and G. M. Moore, constitute the entire membership of the United States Civil Service Commission, and are duly appointed, acting, and qualified as such, and are charged by law with administration of the United States Civil Service laws relating to the appointment and retention of the employee personnel in the Government service of the United States, and particularly in the Postal Service of the United States, and are sued in that capacity only.

6. That the plaintiff was an employee of the Government of the United States as clerk in the Post Office at Boston, Massachusetts, duly qualified under the United States Civil Service rules and regulations, the Veterans Preference Act, and all other statutes of the United States applicable to employees of the United States under the Civil Service rules and regulations. The plaintiff was performing his duties as such clerk from December 16, 1945, until December 14, 1951, when plaintiff was
3 illegally and unlawfully discharged.

7. That the charges upon which the plaintiff was unlawfully discharged were as follows:

Charge (1). That some time in November, 1950, plaintiff conspired with one Louis Nason to defraud the Government and that he did so defraud.

Charge (2). That plaintiff received from Gabriel Movsovitze through Louis Nason the sum of \$42.57 as the result of said conspiracy with said Louis Nason.

Charge (3). That the plaintiff refused to answer questions propounded by inspectors relative to an official investigation in which he was concerned.

Charge (4). That in 1950 he conspired with another clerk, Leo Flynn, to arrange for temporary and substitute cards to be punched.

8. Plaintiff denied that he ever conspired with Louis Nason, Leo Flynn, or any other person to defraud the Government of the United States by falsely registering time cards, and also denied that he had ever received \$42.57, or any sum from Louis Nason, or from Nason for Movsovitze, or from any other person. He also denied defrauding the United States. Plaintiff also denied that he refused to answer the questions of the inspectors, but stated then that he would answer if permitted to have counsel present.

9. But, notwithstanding plaintiff's denial of the charges, and the failure of the Post Office Department to prove said charges, plaintiff was illegally removed from his office as clerk on December 14, 1951, by the agents and employees of the defendant, Postmaster General. Plaintiff appealed to the United States Civil Service Commission under Section 14 of the Veterans Preference Act of 1944 (58 Stat. 390).

4 10. That an alleged hearing was held on said appeal by the First Regional Office of the United States Civil Service Commission, at Boston, Massachusetts, on May 6, 1952, under Section 14 of said Veterans

Preference Act, but plaintiff alleges that said hearing was unfair, in that the evidence on which the charges of the Post Office Department were sustained failed to show that plaintiff was guilty of any of said charges.

11. The Post Office Department did not produce a single witness at said so-called hearing to substantiate the charges. The evidence adduced, if evidence it could be called, consisted of anonymous letters, letter statements from ex-convicts, letter statements from ex-employees, some of whom plaintiff had reported for infractions of the postal rules and who had boasted that they would "get even" with plaintiff. Plaintiff was not confronted with his accusers and not given an opportunity to cross-examine them, in violation of his Constitutional rights. It was shown that many other employees had access to the cards in question. The only direct proof was that plaintiff also had access to said cards along with many others.

12. In addition to the above, plaintiff was confronted with supplemental reports on the day of hearing, instead of 30 days before said hearing, in violation of Section 14 of the Veterans Preference Act. It was also shown that the time clock was 150 yards from plaintiff's cage, and around the corner and out of his sight.

13. The findings of fact made by the Regional Office of the United States Civil Service Commission contradicts its conclusion, but said Regional Office
5 affirmed the decision of the Post Office Department.

14. Thereafter, plaintiff appealed to the United States Civil Service Commission in Washington, and on October 10, 1952, the Board of Appeals Review of the said Civil Service Commission affirmed the decision of the Regional Office. A further appeal was made by the plaintiff to the

said Civil Service Commission late in 1952 and after re-opening the case the Civil Service Commission decided on August 13, 1953 that the discharge of the plaintiff was justified and was for such cause as will promote the efficiency of the Service within the meaning of the Veterans Preference Act.

15. Plaintiff alleges that said hearings were unfair, arbitrary and capricious; that plaintiff's Constitutional rights were violated; and that the conclusions arrived at were not based upon any evidence, except hearsay evidence of the most abhorrent nature. Plaintiff further alleges that substantial evidence of some sort is required before the agency could find the charges were sustained and removed the plaintiff from his position. Plaintiff further alleges that no substantial evidence of any nature whatsoever within the decided case meaning of the word "substantial" was ever presented by the Post Office Department.

16. Plaintiff further alleges that he has no speedy adequate remedy at law, and that the only tribunal where he can maintain and preserve his rights as a preference employee is in the United States District Court of the United States, and that unless this Honorable Court grants the relief prayed for he will be without
6 relief and his rights under the statutes, rules and regulations will be destroyed and held for naught.

The plaintiff's attorney, William F. A. Graham, became severely ill shortly after the hearings in Boston, which illness necessitated his being in the hospital from April of 1952 to December, 1952, during which time he had a serious operation in which his spleen, stomach, part of his esophagus and a rib were removed. Mr. Graham was unable to carry on his duties as an attorney until about May of 1954, at which time he discovered this matter and referred it to Washington for further action. It is

through this serious illness of Mr. Graham's over this two year period of time which has caused the delay in bringing this matter before the Courts. All of Mr. Graham's legal work was suspended by agreements with various Courts and counsel for the opposing parties during this period of time.

17. Plaintiff further alleges that the said defendants, Philip Young, F. J. Lawton and G. M. Moore, constituting the United States Civil Service Commission, and to which plaintiff appealed, have refused, failed and neglected to accord to plaintiff the preferential rights in his employment which plaintiff has in his position in the Post Office at Boston, Massachusetts, and said parties are joined as parties to this action in order that plaintiff's rights may be protected as such preferential employee of the Government of the United States and that he may be fully protected and declared by a declaratory judgment to be entered in plaintiff's favor, and which judgment will fix and determine such rights of plaintiff in his preferential status.

7 18. That plaintiff is entitled to a review of the decision of the Post Office Department and the decisions of the Regional Office of the United States Civil Service Commission, of the Board of Appeals and Review of the United States Civil Service Commission, and of the United States Civil Service Commission itself, under the provisions of Section 10 of the Administrative Procedure Act, all of which decisions were unfair, contrary to law, and violate plaintiff's Constitutional rights, and which decisions were not substantiated by any valid evidence, but were based solely upon hearsay evidence, and at which hearings plaintiff was not confronted with the witnesses nor given the opportunity to cross-examine said witnesses.

19. That the Court in the interest of right and justice should issue forthwith a preliminary mandatory injunction.

tion directed to said defendant, Arthur E. Summerfield, requiring and commanding him that plaintiff be restored to his rightful position in the Post Office at Boston, Massachusetts.

20. Plaintiff further alleges that his rights as a Government employee, and as an honorably discharged soldier, are being wilfully, illegally and unlawfully violated by the defendants, Arthur E. Summerfield, Philip Young, F. J. Lawton and G. M. Moore, in their refusal to reinstate plaintiff to his rightful position, from which he was unlawfully removed.

WHEREFORE, plaintiff prays:

1. That a preliminary injunction issue directed to the defendant, Arthur E. Summerfield as Postmaster General, to forthwith restore plaintiff to his rightful position, from which plaintiff was wrongfully and illegally removed.

8 2. That on the final hearing the preliminary injunction be made permanent, and that plaintiff be restored to his rightful position as of the date on which plaintiff was illegally and wrongfully removed, and for the payment of his salary from the date of his removal to the date of plaintiff's restoration to his position.

3. That plaintiff also have a judgment against said defendants fixing and determining his rights as a preferential employee of the United States, and fixing said rights so as to adjudicate that plaintiff is entitled to his position from which he was illegally and unlawfully removed.

4. That the Court award to plaintiff all the rights, benefits and privileges he would have if he had not been illegally removed from his position as clerk in said Post Office.

5. And for such further and other relief as to the Court may appear equitable and just.

/s/ William J. Byrne
William J. Byrne
Munsey Building
Washington 4, D. C.

/s/ Josephus C. Trimble
Josephus C. Trimble
Munsey Building
Washington, D. C.

/s/ William F. A. Graham
William F. A. Graham
73 Tremont Street
Boston 8, Massachusetts.
Attorneys for Plaintiff.

9 Filed Aug 16 1954 Harry M. Hull, Clerk

STATE OF MASSACHUSETTS)
COUNTY OF MIDDLESEX) SS

I, Charles E. O'Connor, being first duly sworn, depose and say that I have read the foregoing Complaint, and that the facts therein stated are true to the best of my knowledge and belief, and that, unless the action of the defendants in removing me from my position in the Post Office Department is reversed, I will suffer irreparable damage.

/s/ Charles E. O'Connor

Subscribed and sworn to before me this the 27th day of July 1954.

/s/ Joseph P. Graham
Notary Public

My Commission Expires June 20, 1959.

* * * *

10 Filed Nov 19 1954 Harry M. Hull, Clerk

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff's action is barred by his laches.

Third Defense

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants are not required to answer the allegations contained in paragraph 1 of the complaint.

2. The allegations contained in paragraph 2 of the complaint are admitted except that defendant avers that the plaintiff was made a permanent clerk on April 16, 1948.

3, 4, and 5. Admitted.

6. The allegations contained in paragraph 6 of the complaint are admitted except that defendants deny that plaintiff's discharge from Federal employment was illegal.

7. It is denied that the charges upon which plaintiff was discharged are as quoted in paragraph 7 of the complaint. Defendants aver that the following is a verbatim quotation of the charges filed against plaintiff:

11 "Charge No. 1: It is charged that some time in November, 1950 at the south postal annex, Boston, Massachusetts, you conspired with Mr. Louis Nason, 176 Beach Street, Wollaston, Massachusetts, a substitute carrier, to defraud the U. S. Government; that some time during that month an agreement was made between you and Nason whereby you would arrange to have falsely

registered on the time cards of Mr. Gabriel Movsovit, 16 Eliot Crescent, Brookline, Massachusetts, a temporary substitute mail handler at the south postal annex, hours of employment; that as a result of this agreement you did arrange to have registered on Movsovit's time cards hours of service for the period ending December 15th and 31st, 1950.

Charge No. 2: It is further charged that as a result of your conspiracy with Louis Nason, you received from Mr. Gabriel Covsovit through Mr. Louis Nason on or about December 19, 1950, the sum of about \$42.57:

Charge No. 3: It is charged that on this date in our presence as well as that of Inspector J. F. Buckley, in the Federal Building at Boston, Massachusetts, you refused to answer questions asked by us relative to an official investigation in which you are concerned.

Charge No. 4: It is charged that starting in the spring of 1950 and continuing up until about December, 1950, you conspired with Mr. Leo L. Flynn, 71 Peter Parley Road, Jamaica Plain, Mass., a regular clerk at the south postal annex, Boston, Massachusetts, to arrange for the registering of false hours of employment on the time cards of the following named employees assigned to the south postal annex: (naming them)."

8. It is admitted that plaintiff made the denials referred to in paragraph 8 of the complaint. The truth of his denials is denied.

9. It is denied that the Post Office Department failed to prove the charges against the plaintiff and illegally removed him from his position. The remaining allegations contained in paragraph 9 of the complaint are admitted.

10. It is admitted that a hearing was held on plaintiff's appeal to the First Regional Office of the United States Civil Service Commission at Boston, Massachusetts on the date alleged. It is denied that the plaintiff was not afforded a hearing and it is further denied that the evidence failed to sustain the charges upon which plaintiff was discharged.

11. Each and every allegation contained in paragraph 11 of the complaint is denied, except that it is admitted that the plaintiff was not confronted by all the adverse witnesses at the hearing.

12. The allegations contained in the first sentence of paragraph 12 of the complaint are denied. The allegation contained in the second sentence of paragraph 12 is admitted.

13. Denied.

14. It is admitted that plaintiff appealed to the U. S. Civil Service Commission in Washington which, on October 10, 1952 affirmed the decision of the Regional Office. It is denied that there was a reopened hearing. On January 7, 1953 the Civil Service Commission received a letter from Congressman John W. McCormack requesting that the Commission advise him of the facts of the case in order that he might reply to a letter received from the plaintiff. On August 13, 1953 the Commission directed a letter to Congressman McCormack stating that they had considered all of the evidence developed in connection with the case and that the plaintiff's discharge was justified.

15. The allegations contained in paragraph 15 of the complaint are denied except defendants admit that hearsay and affidavit-type evidence was used.

16. The allegations contained in paragraph 16 of the complaint are denied and defendants aver that in any event, they are immaterial.

17. Defendants are not required to answer the allegations contained in paragraph 17 of the complaint.

18. Denied.

19. Defendants are not required to answer the allegations contained in paragraph 19 of the complaint.

20. Denied.

WHEREFORE, having fully answered, defendants demand judgment together with the costs of this action.

/s/ Leo A. Rover
Leo A. Rover
United States Attorney

/s/ Oliver Gasch
Oliver Gasch
Assistant United States
Attorney

/s/ Frank H. Strickler
Frank H. Strickler
Assistant United States
Attorney

/s/ Robert L. Toomey
Robert L. Toomey
Assistant United States
Attorney

Certificate of Service

I hereby certify that service of the foregoing Answer was made upon plaintiff by mailing a copy thereof to his attorney, Josephus C. Trimble, Esquire, Munsey Building, Washington, D. C. this 3d day of November, 1954.

/s/ Robert L. Toomey
Robert L. Toomey
Assistant United States
Attorney

Filed Aug 12 1955 Harry M. Hull, Clerk

• • • •

28

Memorandum Opinion

Inasmuch as I have come to the conclusion that plaintiff's cause of action is barred by laches, it is unnecessary to consider the merits of the cause.

Counsel for defendant is directed to submit proposed order for my signature.

See 123 F. Supp. 831

249 U. S. 367

98 F. 2d 296

129 F. Supp. 605

DATED: This 9 day of August, 1955

/s/ Ben Harrison
Judge

Filed Sep 9 1955 Harry M. Hull, Clerk

• • • •

29

Findings of Fact and Conclusions of Law

Findings of Fact

1. Plaintiff, Charles E. O'Connor, was appointed a permanent Clerk in the United States Post Office Department in Boston, Massachusetts on April 1, 1948.

2. On November 13, 1951 plaintiff was charged by the Post Office Department with conspiracy to defraud the United States Government, with conspiracy to arrange for the registering of false hours of employment on time cards of named employees, with receipt of \$42.57 as the result of the first conspiracy, and with refusal to answer questions asked by official investigators of the Post Office Department.

3. Plaintiff was accorded a hearing before the First United States Civil Service Regional office on May 6,

1952, following which, on May 19, 1952, he was ordered dismissed from Federal employment.

4. On December 14, 1952 plaintiff's dismissal was affirmed by the Board of Appeals and Review of the Civil Service Commission.

5. On January 7, 1953 Congressman John M. McCormack addressed a letter to the Civil Service Commission requesting advice regarding plaintiff's case

30 6. As a result of Congressman McCormack's letter, the Commissioners considered plaintiff's case and, on August 13, 1953, advised Congressman McCormack that plaintiff's dismissal had been proper.

7. Plaintiff was represented by Mr. William F. A. Graham, a Boston attorney of the firm of Lee and Graham.

8. During the period April, 1952 to May, 1954 Mr. William F. A. Graham was seriously ill and underwent a number of serious surgical operations which required long periods of convalescence.

9. At plaintiff's hearing before the First Civil Service Regional Office on the charges against him he was represented not only by Mr. William F. A. Graham, but also by Mr. Joseph P. Graham of the firm of Lee and Graham who participated in the hearing.

10. In spite of the fact that Mr. Joseph P. Graham was familiar with plaintiff's case, plaintiff elected to await the eventual possible recovery of Mr. William F. A. Graham from his illness before seeking judicial relief from the order of dismissal.

Conclusions of Law

1. Any relief to which plaintiff might otherwise be entitled is barred by his laches.
2. Defendants are entitled to judgment.

Ben Harrison
Judge

Dated: Sept. 6, 1955

Certificate of Service

I hereby certify that service of the foregoing Findings of Fact and Conclusions of Law was made upon plaintiff by mailing a copy thereof to his attorney, Josephus C. Trimble, Esquire, Munsey Building, Washington, D. C. this 18th day of August, 1955.

/s/ Robert L. Toomey
Robert L. Toomey
Assistant United States
Attorney

31 Filed Sep 9 1955 Harry M. Hull, Clerk

• • • •

Judgment

Upon consideration of the pleadings and the evidence adduced at the trial of the action, and the Court having entered findings of fact and conclusions of law, it is by the Court this 6 day of Sept, 1955,

ORDERED that judgment be and the same hereby is entered for the defendants.

Burt Harrison
Judge

Certificate of Service

I hereby certify that service of the foregoing Judgment was made upon plaintiff by mailing a copy thereof to his attorney, Josephus C. Trimble, Esquire, Munsey Building, Washington, D. C. this 18th day of August, 1955.

/s/ Robert L. Toomey
Robert L. Toomey
Assistant United States
Attorney

Filed May 6 1955 Harry M. Hull, Clerk

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- 14 *Report and Opinion of the Commissioner of
Veterans Cases on Preliminary Questions of
Law Raised by Answer of Defendants*

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27 CONCLUSION

For the reasons stated and the authorities cited, I recommend that (1) plaintiff has shown in the pleadings and record a provable claim for grantable relief; (2) the defense of laches has been satisfactorily overcome by plaintiff's undisputed allegations; (3) there was a reopening of the proceeding in the Civil Service Commission in response to the request of Congressman McCormack; and that there is no reasonable basis in law for the recommended affirmance of the initial agency action by the Appeals Examiner as evidenced by the transcript of evidence taken at the hearing.

Respectfully submitted,

/s/ John Henry Sullivan
John Henry Sullivan
Commissioner of
Veterans Cases

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13011

CHARLES E. O'CONNOR, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, ET AL.
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ROBERT L. TOOMEY,
RICHARD J. SNIDER,
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED SEP 21 1956

Joseph W. Stewart
CLERK

QUESTION PRESENTED

Appellant, while a Civil Service employee of the United States Post Office Department, received notice of charges and was subsequently removed from his position at the expiration of thirty days. Thereafter, pursuant to provisions of Section 14 of the Veterans' Preference Act, 5 U. S. C. § 863, his case was heard by the first United States Civil Service Regional Office and was later reviewed by the Board of Appeals and Review within the Commission. Instead of then availing himself of appropriate judicial relief, appellant sought the assistance of his Congressman. The Commission, in response to a letter from the Congressman, advised that appellant's dismissal was proper. Finally, appellant brought suit in the District Court, contending that he had been wrongfully discharged and demanding compensation. More than twenty-two months had elapsed from the date of the Board of Appeals and Review decision and twelve months had intervened since the Commission's letter to appellant's Congressman. It was claimed by appellant that this delay was caused by the illness and hospitalization of one of the two attorneys who had represented and participated in the Civil Service hearings. The District Court concluded that appellant's suit was barred by *laches*.

In the opinion of the appellees the following question is presented:

1. Whether, under the circumstances of the case, appellant's claim for reinstatement is barred by the operation of the doctrine of *laches*?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13011

CHARLES E. O'CONNOR, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, ET AL.
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is a federal employee discharge case. The District Court entered judgment¹ against the appellant, a veterans' preference eligible,² who claimed he was unlawfully removed from his position of clerk in the Post Office Department. It held that his suit³ for reinstatement and restoration of accrued benefits, filed more than twenty-two months after his separation was affirmed by the Board of Appeals and Review of the Civil Service Commission,⁴ was barred by *laches*. (J. A. 14-16.)

¹ U. S. District Court Civil Action No. 3450-54.

² As defined in Section 2 of the Veterans' Preference Act, approved June 27, 1944, 58 Stat. 387, 5 U. S. C. § 851 (1952).

³ Jurisdiction was based upon the Veterans' Preference Act, Section 14, 5 U. S. C. § 863; the Declaratory Judgment Act, 28 U. S. C. § 2201; and the Administrative Procedure Act, Section 10, 5 U. S. C. § 1009.

⁴ See Paragraphs 14 of Complaint and Answer.

Following a thirty-day notice given to him on November 13, 1951, appellant was discharged from the postal service on December 14, 1951, upon charges that he had conspired with certain named persons to defraud the United States Government by arranging for the false registering of hours of employment on time cards of certain named employees; that he had received a certain sum of money for his part in one of the conspiracies; and that he had refused to answer questions asked by official investigators of the Post Office Department relative to an investigation in which he was concerned.⁵ (J. A. 10-11, 14.) Thereafter, he sought and received a hearing, pursuant to Section 14 of the Veterans' Preference Act, 5 U. S. C. § 863, before an Appeals Examiner of the First United States Civil Service Regional Office. At the hearing, held May 6, 1952, appellant was represented by Messrs. William F. A. Graham and Joseph P. Graham of the firm of Lee and Graham. Both

⁵ The charges read as follows:

Charge No. 1: It is charged that some time in November, 1950, at the south postal annex, Boston, Massachusetts, you conspired with Mr. Louis Nason, 176 Beach Street, Wollaston, Massachusetts, a substitute carrier, to defraud the U. S. Government; that some time during that month an agreement was made between you and Nason whereby you would arrange to have falsely registered on the time cards of Mr. Gabriel Movsovit, 16 Elliot Crescent, Brookline, Massachusetts, a temporary substitute mail handler at the south postal annex, hours of employment; that as a result of this agreement you did arrange to have registered on Movsovit's time cards hours of service for the period ending December 15th and 31st, 1950.

Charge No. 2: It is further charged that as a result of your conspiracy with Louis Nason, you received from Mr. Gabriel Movsovit through Mr. Louis Nason on or about December 19, 1950, the sum of about \$42.57:

Charge No. 3: It is charged that on this date in our presence as well as that of Inspector J. F. Buckley, in the Federal Building at Boston, Massachusetts, you refused to answer questions asked by us relative to an official investigation in which you are concerned.

Charge No. 4: It is charged that starting in the spring of 1950 and continuing up until about December, 1950, you conspired with Mr. Leo L. Flynn, 71 Peter Parley Road, Jamaica Plain, Mass., a regular clerk at the south postal annex, Boston, Massachusetts, to arrange for the registering of false hours of employment on the time cards of the following named employees assigned to the south postal annex: (naming them).

attorneys participated in the hearing.* On May 19, 1952, the First Regional Office sustained the action of the Post Office Department in removing appellant from his position (J. A. 14-15.)

Appellant then filed an appeal to the Board of Appeals and Review within the Civil Service Commission. On October 10, 1952, the Board affirmed appellant's separation, holding that after consideration of the charges the weight of the evidence supported his dismissal "for such cause as will promote the efficiency of the service." 5 U. S. C. § 863. (J. A. 5-6, 12, 14-15.)

Instead of applying to the courts for appropriate relief, appellant sought the assistance of his Congressional representative who, in turn, wrote to the Commission requesting advice regarding appellant's case. As a result, on August 13, 1953, the Commission responded to the Congressman's letter that it had concluded from a careful consideration of all the evidence developed in connection with the case that appellant's dismissal was justified and proper (J. A. 15).

Finally on August 16, 1954, more than twenty-two months having elapsed from the date court action could have been initiated, appellant brought this suit in the District Court for the District of Columbia, seeking declaratory and injunctive relief to restore him to his former position. He alleged *inter alia* that "the delay in bringing this matter before the courts" was caused by the illness and hospitalization of one of the two attorneys who had participated in the hearing before the First Regional Office (J. A. 6-7, 15). The complaint also stated that this attorney "was unable to carry on his duties * * * [from April of 1952] until about May of 1954 at which time he *discovered this matter and referred it to Washington for further action*" (J. A. 6, Comp. pp. 6). (Emphasis supplied.) *No mention was made of the other attorney.*

Upon the filing of appellees' answer, which included a claim that appellant's action was barred by laches, the case was referred to the Commissioner of Veterans' cases. On May 6,

* See Partial Transcript of Proceedings, District Court, June 15, 1953, pp. 4, 13.

1955, the Veterans' Commissioner recommended that the defense of laches had been satisfactorily overcome by the allegations of the complaint. (J. A. 10, 17). Nonetheless, upon consideration of the pleadings and evidence adduced at the trial of the action, the Court, in a memorandum opinion dated August 9, 1955, concluded that appellant's suit was barred by *laches*. Thereafter, the Court entered findings of fact, conclusions of law and judgment for the appellees. (J. A. 14-16). This appeal followed.

STATUTE INVOLVED

Section 14 of the Veterans' Preference Act (5 U. S. C. § 863) provides in pertinent part:

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall

have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative * * *

SUMMARY OF ARGUMENT

A Government employee must act promptly and diligently if he seeks to challenge his removal in the courts. Substantial delay in the effective enforcement of his rights is a complete bar to the maintenance of an action for reinstatement. In the present case, the almost two-year delay in initiating court action exceeds any reasonable period. Nor is it justified by the excuse offered by appellant that he was awaiting the eventual recovery of one of the two attorneys who had represented him in the Civil Service hearing. The standard of diligence required was not met here, and the suit therefore, was properly held to be barred by *laches*. To permit appellant to challenge that action now could only operate to cause interminable litigation and prohibit a final decision in a matter which should have been acted upon with dispatch.

ARGUMENT

I

Appellant's Claims Are Barred by Laches

Appellant's suit for reinstatement and restoration of accrued benefits was filed in the District Court twenty-two months after he was notified that his discharge had been sustained by the Board of Appeals and Review of the Civil Service Commission. Such extraordinary delay, unless adequately excused, obviously constitutes *laches*. The authorities are unanimous that while the statute of limitations is not operative in a case of this nature which seeks extraordinary legal relief in the form

of mandamus, the remedy is equitable, and laches is a good defense.⁷

Each case, of course, must be decided upon its own facts. In the finding of facts and conclusions of law of the case at bar, the trial court found that appellant had been guilty of *laches* so as to bar his claim. This determination should not be set aside, for it is well settled that the law imposes a duty upon a Government employee who claims he has been unlawfully discharged to act *promptly, diligently, and effectively* in asserting his claim. *Arant v. Lane*, 249 U. S. 367 (1919); *Grasse v. Snyder*, 89 U. S. App. D. C. 352, 192 F. 2d 35 (1951).

In *Arant v. Lane, supra*, the Supreme Court held that relief should be denied, without inquiring into the merits of the claim, where petitioner, in a mandamus action seeking reinstatement to an office from which it was alleged he had been unlawfully removed, had waited twenty months before seeking judicial relief. The doctrine of *laches* has also been applied in comparable situations where the employee's delay in effectively asserting his claim was for a period of only eleven months, *Norris v. United States*, 257 U. S. 77 (1921);—sixteen months, *Grasse v. Snyder, supra*;—eighteen months, *Caswell v. Morgenthau*, 69 App. D. C. 15, 98 F. 2d 296 (1938), *cert. denied*, 305 U. S. 596 (1938);—three years, *Nicholas v. United States*, 257 U. S. 71 (1921).

The considerations underlying the doctrine were succinctly stated by the Supreme Court in *Arant v. Lane, supra*, and were quoted by this Court with approval in *Grasse v. Snyder, supra*:

When a public official is unlawfully removed from office, whether from disregard of law by his superior or

⁷ *Arant v. Lane*, 249 U. S. 367, 372 (1919); *Haas v. Overholser*, 96 U. S. App. D. C. 22, 223 F. 2d 414 (1955); *Davis v. Summerfield*, 95 U. S. App. D. C. 78, 219 F. 2d 510 (1955); *Wunderle v. Kimball*, 91 U. S. App. D. C. 394, 210 F. 2d 707 (1952); *Baxter v. Pace*, 89 U. S. App. D. C. 392, 193 F. 2d 20 (1951); *Grasse v. Snyder*, 89 U. S. App. D. C. 352, 192 F. 2d 35 (1951); *Farley v. Abetmeier*, 72 U. S. App. D. C. 280, 114 F. 2d 569 (1940); *Cromwell v. Doyle*, 69 U. S. App. D. C. 215, 99 F. 2d 448 (1938), *cert. denied*, 306 U. S. 640 (1939); *Caswell v. Morgenthau*, 69 App. D. C. 15, 98 F. 2d 296 (1938), *cert. denied*, 305 U. S. 596 (1938).

from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government's service may be disturbed as little as possible, and that two salaries shall not be paid for a single service.

Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of service to which he was attached, and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interest of justice and sound public policy.

Moreover, in *Caswell v. Morgenthau*, *supra*, this Court pointed out that a period of delay of as little as *four months* in pursuing his remedy may be sufficient to bar an action by a discharged Government employee, citing *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 N. Y. S. 698 (1896). In the latter case, the employee was discharged on August 23, 1895. He demanded that he be reinstated on December 27, 1895 and on December 31, 1895, made an affidavit and served notice of the motion upon which the order appealed from was made. The Court, nevertheless, in holding that the case was barred by laches said:

It is manifestly unfair, when there is disagreement as to the propriety or legality of the discharge, that the relator (employee) should lie still, and allow another person to occupy the position from which he has been removed, and draw the pay for his services therein, and, after more than four months has elapsed, that he should be allowed to have this remedy by mandamus to be reinstated in the office, and recover compensation for serv-

ices therein which he has not performed, and which he has for a long time, without objection, permitted another person to perform and be paid for.

Appellant attempts to distinguish these cases on the ground that there is no evidence of record that his position or salary was being received by another. But in a case of this nature prejudice to the Government is presumed. Under these circumstances, the doctrine of laches as a defense presumes that the lapse of time is constantly destroying evidence of rights and accumulating detriments against the Government.

The Supreme Court and this Court have repeatedly recognized that added expense, interference with efficient service, and a disturbance of Government operation are its inevitable consequences. Moreover, it is manifest that during a prolonged period, a discharged employee's position must either have been filled by another employee or abolished.

In *Arant v. Lane*, *supra*, the Supreme Court said that a delay of two years in the effective assertion of a claim for reinstatement "*must necessarily result in changes in the branch of the service to which he was attached * * **" In *Nicholas v. United States* *supra*, the Supreme Court reminded "that we are dealing with the discharge of *public duties* which it is important *shall be carried on regardless of the personnel* of those who discharge them." In *Norris v. United States*, *supra*, the Court pointed out that the law imposes a duty on a discharged federal employee to act promptly "if he would recover compensation for services in an office which the *Government might fill with another, or otherwise adjust its service so as to dispense with the service of the [employee].*" (Emphasis supplied.)

In *Grasse v. Snyder*, *supra*, this Court said "*the position in question was one which obviously required and received a replacement * * **" And in *Caswell v. Morgenthau*, *supra*, this Court stated "** * * we must assume that the present employees in the department in question are all who are necessary to do the work * * **". (Emphasis supplied.) In the light of these decisions, there is obviously no merit to appellant's contention. Therefore, it is incumbent upon appellant

to show that his delay in asserting whatever rights he might have had is excusable under the circumstances.

This principle was recently affirmed in *Landell v. Northern Pacific Ry. Co.*, 96 U. S. App. D. C. 24, 223 F. 2d 316 (1955) affirming 122 F. Supp. 253 (D. C. D. C. 1954).⁸ There it was held that faulty judgment of counsel in advising administrative or legislative action instead of initiating appropriate judicial proceedings is no defense against a charge of *laches*. In this same connection, the bringing of a defective law suit was expressly rejected as an excuse for *laches* by this Court in *Baxter v. Pace*, 89 U. S. App. D. C. 392, 394-395, 193 F. 2d 20 (1951). The Supreme Court has ruled that a party's alleged poverty or pecuniary embarrassment will not suffice for postponing the assertion of rights. *Leggett v. Standard Oil Company*, 149 U. S. 287, 294 (1893); *Hayward v. National Bank*, 96 U. S. 611 (1877). And this Court has held that neither poverty, illiteracy or ignorance of the law, nor all of them combined will avail as an excuse for *laches*. *Levis v. Kengla*, 8 App. D. C. 230, 239 (1896).⁹

Appellant seeks to avoid the consequences of his delay by asserting and relying upon the serious illness and consequent hospitalization of one of the two attorneys who represented him during the Civil Service hearings. It is, of course, regrettable that counsel required this hospitalization and treatment, and reference to his illness no doubt presents a certain appeal. But to ask this Court to hold that his illness *per se* constitutes such circumstances as to excuse the almost two year delay in the filing of this suit would be to strike down the defense of *laches*.¹⁰ In this case, the record shows, beyond any

⁸ *Cert. Denied*, 350 U. S. 884 (1955), *reh. denied*, 350 U. S. 905 (1955).

⁹ *Affirmed on other grounds*, 169 U. S. 234 (1898).

¹⁰ In *Kaplan v. Joseph*, 125 F. 2d 602 (7th Cir. 1942) the Court did reverse a finding of *laches* where the illness of plaintiff's attorney was pleaded as a defense. But there were numerous other considerations which prompted this decision, one of which was the unexplained delay of the defendant in taking some action to present the mandate of the appellate court in the original suit.

Cf. *State ex rel McMurray v. Orleans Parish School Board*, 189 La. 502, 179 So. 834 (1938) where it was held that plaintiff's delay of one year was not excused in a suit to recover State employment, although she had promptly placed the matter in the hands of an attorney, who failed to take action.

doubt, that this attorney did not practice law alone.¹¹ His brother, who was his law partner, not only was familiar with appellant's case, but had represented appellant and had participated in the Civil Service hearings.¹² No reason has been shown why this second attorney could not have taken prompt action to protect appellant's alleged rights, at least to the extent of referring the matter to a Washington attorney. Instead, it appears that appellant *after consultation*, simply decided to await the eventual recovery of the first attorney.¹³

From a description of his illness and the operations which this attorney was required to undergo, it is evident that this promised to be a long wait. In the circumstances and in view of the principles of the cases cited above it appears that appellant was not diligent in seeking judicial relief, especially when there was available to him assistance of other counsel in the very law firm which was handling his case. These considerations, coupled with the great need for diligence in these cases, led the District Court to conclude that appellant's *laches* precluded any relief to which he might be otherwise entitled.

Appellee recognizes, of course, that there are no statutory provisions for review of decisions of the Civil Service Commission in employee discharge cases, and hence, no period of limitation for suits of this nature is anywhere specified. In other fields, however, where judicial review of agency action is allowed by statute, Congress has consistently provided only thirty to sixty days for bringing the appropriate action. *E. g.*

¹¹ At the trial of the case in the District Court, William F. A. Graham testified that although "[Mr. Lee's] name is still on the firm * * * he does not practice law. So Lee and Graham is solely William F. A. Graham, and my brother Joseph and I are true partners in every sense of the word." Partial Transcript of Proceedings, June 15, 1955, p. 4.

¹² Findings of Fact Nos. 9, 10. And see Partial Transcript of Proceedings, pp. 4, 13.

¹³ It would seem incredible to allow appellant to await the eventual recovery of his counsel. Should this Court so hold it would be possible to prolong situations of this kind not only for 12 to 22 months, but for 12 to 22 years. Moreover, a fact that must be considered, even reluctantly, is that this attorney might never have recovered from his hospitalization. It seems clear under these circumstances that this Court should not find that appellant would be permitted to await such an outcome before filing the requisite suit.

5 U. S. C. § 118 (k) (1952) (thirty days allowed to petition for review of Civil Service Commission's decisions in certain Hatch Act cases); 5 U. S. C. § 1034 (1952) (sixty days allowed for review of Federal Communications Commission, Federal Maritime Board and other agency orders). Using these statutory periods as a standard, as is appropriate, it is again manifest that appellant's delay in bringing the present suit is fatal.¹⁴

Appellant's contention that his case was reopened at the request of congressional intervention is obviously without merit. His purpose, of course, is clear. He seeks to show that he had not exhausted his administrative remedies with the Board's decision of 1952.

But the Civil Service Commission regulations provide that an appeal is not to be reopened unless there is "new and material evidence." 5 C. F. R. § 22.11 (d).¹⁵ The letter, written by the Congressman, was merely to request advice as to appellant's situation. The Commission, in response to that request, found that there was no merit to any appeal which appellant might further seek to bring. Actually, all the Commission did was to advise that the decision of the Board of Appeals and Review should stand since there was no evidence to refute the decision. This position is strengthened when it is realized that the Government was never afforded an opportunity to make written representations or to submit a brief as is required by the regulations when an appeal is reopened. 5 C. F. R. § 22.11 (e).¹⁶ It is therefore clear that appellant exhausted his administrative remedies in 1952. See *Grasse v. Snyder, supra*; *Elchibegoff v. Dulles*, 123 F. Supp. 831

¹⁴ See 19 Am. Jur., Equity § 500.

¹⁵ 5 C. F. R. § 22.11 (d) provides.—"*Decision on further appeals.* Decisions on appeals to the Commissioners will be transmitted to the appellant or his designated representative and the employing agency concerned with notifications to both parties that no further appeals will be entertained as to the particular case unless new and material evidence is submitted."

¹⁶ 5 C. F. R. § 22.11 (e) provides.—"*Reopened appeals.* The Commissioners may in their discretion, when in their judgment such action appears warranted by the circumstances, reopen an appeal at the request of the appellant, or his designated representative, or the employing agency concerned and may grant both parties an opportunity for a personal appearance. In connection with such reopened appeals, both parties will be afforded an opportunity to submit briefs or written representations."

(D. C. D. C. 1954), *affirmed*, 95 U. S. App. D. C. 362, 222 F. 2d 52 (1955).

Even if this Court should find as a result of the intervention by a member of Congress in this matter, that appellant's case was reopened before the Civil Service Commission, it seems clear from the considerations previously announced that appellant's claim is barred by *laches*. For following the Commission's consideration of this matter to enable it to advise appellant's Congressional representative of the situation, appellant waited more than twelve months before he filed the suit in issue. This delay is also explained by appellant on the basis of the illness of his counsel. But as previously shown, the District Court was well aware of the circumstances, and its findings of fact on this matter are not to be challenged. To permit appellant to challenge his discharge at this time could only operate to cause interminable litigation and prohibit final decision in a manner which should have been acted upon with dispatch.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ROBERT L. TOOMEY,
RICHARD J. SNIDER,
Assistant United States Attorneys.

